Supreme Court, U.S.
FILED
AUG 14 2000
OFFICE OF THE CLERK

Record No. 00246

In The Supreme Court of the United States

CHERYL COHEN, on behalf of herself and others similarly situated,

Petitioner,

v.

OFFICE DEPOT, INC., a Florida Corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

ALVIN D. LODISH
Counsel of Record
BILZIN SUMBERG DUNN PRICE & AXELROD
200 South Biscayne Blvd., Ste. 2500
Miami, Florida 33131-2336
(305) 374- 7580

ROBERT C. MALAND
ROBERT C. MALAND, P.A.
Two Datran Center, Ste. 1705
9130 S. Dadeland Blvd.
Miami, Florida 33156
(305) 670-4900

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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QUESTIONS PRESENTED

Whether the decision of the Eleventh Circuit Court of Appeals in this case finding that punitive damages may not be aggregated in a class action to satisfy the amount in controversy required by 28 U.S.C. Section 1332, which is in conflict with the Fifth Circuit Court of Appeals' decision in Allen v. R&H Oil & Gas Co., 63 F.3d 1326 (5th Cir. 1995), is in conformity with this Court's holdings in Snyder v. Harris, 394 U.S. 332, 89 S. Ct. 1053 (1969) and Zahn v. International Paper Co., 414 U.S. 291, 94 S. Ct. (1973) regarding the nature of common and undivided interests for aggregating damages.

Whether the Eleventh Circuit's interpretation of the "matter in controversy" language of 28 U.S.C. Section 1332 exclusively from a single plaintiff's perspective properly construes a defendant's interest, whether corporate or individual, in obtaining the benefits of Federal jurisdiction, or whether defendant(s)' Constitutionally protected Equal Protection Guarantees have been violated.

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Petitioner, Cheryl Cohen ("Cohen"), on behalf of herself and others similarly situated, petitions for a writ of certiorari to the United States Supreme Court to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

STATEMENT OF JURISDICTION

The initial opinion of the Eleventh Circuit Court of Appeals determining the existence of jurisdiction under 28 U.S.C. Section 1332 (App. A, *infra*, 1a-16a) was issued on August 17, 1999 and is reported at 184 F. 3d 1292 (11th Cir. 1999). On a timely filing of a Petition for Rehearing and Rehearing En Banc by Respondent, Office Depot, Inc., the Eleventh Circuit Court of Appeals issued an opinion on February 24, 2000 (App. B, *infra*, 17a-46a) that affirmed the dismissal by the district court for lack of jurisdiction and vacated, in part, the initial opinion of the Court and is reported at 204 F.3d 1069 (11th Cir. 2000). The Order denying Petitioner's Petition for Rehearing and Rehearing En Banc (App. C, *infra*, 47a-48a) was issued on May 31, 2000. The Order granting Petitioner's Motion to Stay Issuance of Mandate pending the filing of this Petition for Writ of Certiorari (App. D, *infra*, 49a-50a) was issued on July 7, 2000.

The opinion of the District Court with respect to dismissal for lack of subject matter jurisdiction (App. E, *infra*, 51a-60a) was issued on April 3, 1998. This Court has jurisdiction pursuant to 28 U.S.C. Section 1254 and Rule 10 of the Supreme Court Rules.

STATUTORY PROVISIONS INVOLVED

Title 28, U.S.C. Section 1332(a) is involved in this case, and provides, in relevant part, "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between -- (1) citizens of different states...."[1]

STATEMENT OF THE CASE

A. Factual Background

On November 12, 1997 Cohen, on behalf of herself and others similarly situated, filed a Class Action Complaint ("Complaint") against Respondent, Office Depot, Inc. ("Office Depot") in the Federal District Court for the Southern District of Florida. R1-1. [2] The Complaint alleged that Office Depot engaged in unfair, deceptive and fraudulent business and trade practices and sought relief under Florida common law and

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[1] The well-settled law of this Court is that in diversity cases brought in federal court under Section 1332, the amount in controversy is the sum claimed in plaintiff's complaint. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 58 S. Ct. 586 (1938).

[2] Record references refer to the record before the Eleventh Circuit Court of Appeals. The "R1," "R2" or "R3" cites refer to the volume number, document number and page number, if applicable, of the record below.

statutory theories and asserted that diversity jurisdiction existed under 28 U.S.C. Section 1332. R1-1-3.[3]

Specifically, Cohen asserted that in its mail order catalogs, Office Depot advertises that its prices are the lowest prices available in the market and that it provides free delivery of merchandise ordered from its catalogs. R1-1-3. As such, Office Depot's claims lead customers to believe that the prices for merchandise in the catalogs will be as low, if not lower, than the prices of identical merchandise purchased from any other office supply store, including Office Depot's own stores. R1-1-3. In fact, as Cohen's Complaint revealed, Office Depot's catalog prices often are significantly higher than the price of the same item in the Office Depot stores. R1-1-3. This information was withheld from customers. R1-1-5.

Cohen requested compensatory damages, statutory attorneys' fees, injunctive relief and punitive damages,[4] all of

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[3] The proposed class consisted of "All individuals and businesses who purchased merchandise from Office Depot's catalogs during the past four (4) years, when they could have purchased identical merchandise for a lower price at an Office Depot store." R1-1-7. Cohen estimated that the class would include over one thousand customers, in each of the 39 states in which Office Depot maintains stores, for a total of approximately 39,000 class members. R1-1-7.

[4] Cohen sought punitive damages under Florida law because the deceptive and fraudulent statements made by Office Depot for the purpose of inducing customers to purchase catalog merchandise was done wantonly, intentionally and maliciously. R1-1-10. In support of her request, Cohen asserted that when

which are properly considered in determining the amount in controversy to establish subject matter jurisdiction pursuant to 28 U.S.C. Section 1332. R1-1-2.[5]

In fact, in ruling on Office Depot's motion to dismiss for lack of subject matter jurisdiction, the District Court found that Cohen's claim for $10,000,000 in punitive damages for the class appeared to satisfy the amount in controversy requirement of Section 1332. (App. E, *infra*, 55a). However, the District Court struck Cohen's claim for punitive damages because it found that Section 768.72, Fla. Stat. was a substantive statute requiring a party in federal court to seek leave of Court prior to asserting a claim for punitive damages. On this basis, the District Court dismissed the Complaint for failure to satisfy the amount in controversy requirement of Section 1332.[6] (App.

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confronted by allegations that its statements constitute a deceptive trade practice, an Office Depot spokesman stated to the Miami Herald Newspaper, "It is certainly not uncommon that catalog pricing would be a little higher because of providing free delivery,"thereby admitting Office Depot's knowledge that its claim of "free delivery" is not only misleading, but false. R1-1-6.

[5] In Bell v. Preferred Life Assur. Soc. of Montgomery Ala, 320 U.S. 238, 64 So. Ct. 5 (1943), this Court held that where actual and punitive damages are recoverable under a complaint, each must be considered to the extent claimed in determining the jurisdictional amount.

[6] From the inception of this lawsuit, the parties have not disputed that there is diversity of citizenship between Cohen and Office Depot pursuant to Section 1332.

E., *infra*, 50a). Cohen appealed the District Court's dismissal of the Complaint. R3-60.

In its first opinion in this case, issued on August 17, 1999 ("Cohen I") the Eleventh Circuit Court of Appeals reversed the District Court's dismissal and held that Section 768.72, Fla. Stat. conflicts with and must yield to the "short and plain statement rule contained in Fed. R. Civ. P. 8(a)(3) and as such a Florida plaintiff in federal court because of diversity jurisdiction need not obtain leave of court before pleading a request for punitive damages." (App. A, *infra*, 1a-16a).

The Cohen I court also determined that in a class action lawsuit, punitive damages may be aggregated to satisfy the amount-in-controversy requirement pursuant to the authority of Tapscott v. MS Dealer Service Corp., 77 F.3d 1353 (11th Cir. 1996). (App. A, *infra*, 5a). Thus, the court found that the amount in controversy requirement was satisfied by the request for $10,000,000 in punitive damages for the class of approximately 39,000. (App. A, *infra*, 15a-16a).

Subsequent to the August 17, 1999 opinion, Office Depot filed a Petition for Panel Rehearing. Office Depot argued that the Cohen I holding regarding Section 768.72, Fla. Stat. was incorrect and also contended, belatedly, that Cohen I erred in relying on the Tapscott decision to allow for aggregating punitive damages because of a conflict with Lindsey v. Alabama Telephone Co., 576 F.2d 593 (5th Cir. 1978), which it maintained did not allow aggregation.[7]

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[7] In 1981, the Fifth Circuit Court of appeals "split" and the Eleventh Circuit was created. Accordingly, cases decided by

After supplemental briefing on the purported conflict between Lindsey and Tapscott, the court issued a second opinion on February 24, 2000 ("Cohen II") in which it upheld Cohen I on the issue that Section 768.72, Fla. Stat. is not applicable for pleading claims for punitive damages in federal court. (App. B, *infra*, 17a-46a). However, Cohen II vacated Cohen I with respect to the holding that the amount in controversy was satisfied by aggregating the $10,000,000 punitive damage request. (App. B, *infra*, 18a).

The Cohen II panel determined that: 1) there was a conflict between Lindsey and Tapscott; and 2) it was bound to follow Lindsey as precedent in the Eleventh Circuit. The Cohen II court affirmed the District Court's dismissal of Cohen's Complaint and disallowed aggregation of punitive damages in this case. (App. B, *infra* 17a-30a). On this issue, the Cohen II Court tacitly acknowledged a conflict with the Fifth Circuit Court of Appeals by citing to Allen v. R&H Oil & Gas Co., 63 F.3d 1326 (5th Cir 1995).[8] (App. B, *infra*, 26a).

Thereafter, on March 16, 2000 Cohen filed a Petition for Rehearing and Rehearing En Banc ("Petition for Rehearing"). Cohen argued that Cohen II improperly relied on

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the Fifth Circuit prior to 1981, are binding on the current Fifth Circuit Court of Appeals, as well as the Eleventh Circuit Court of Appeals. See Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981).

[8] The Cohen II panel also found that neither Cohen's request for attorneys' fees nor the value of injunctive relief sought by Cohen satisfied the amount in controversy requirement. (App. B, *infra*, 30a-46a).

Lindsey instead of Tapscott as precedent for determining a common and undivided interest for aggregating punitive damages because Lindsey failed to consider Supreme Court law on the issue, as set forth in Snyder v. Harris, 394 U.S. 332, 89 S. Ct. 1053 (1969) and Zahn v. International Paper Co., 414 U.S. 291, 94 S. Ct. 505 (1973).

Moreover, Cohen's Petition for Rehearing pointed out that the Fifth Circuit Court of Appeals in Allen v. R & H Oil & Gas Co., 63 F.3d 1326 (5th Cir. 1995) held that the collective nature of punitive damages under Mississippi law allowed for aggregation to satisfy the amount in controversy. Allen was decided subsequent to Lindsey and Allen cited Lindsey, but noted that "[the issue whether punitive damages ... represent a common and undivided interest] is a [question] of first impression ... in this circuit." Allen, 63 F.3d 1332.[9]

Cohen's Petition for Rehearing was denied on May 31, 2000. (App. C, *infra*, 47a-48a). On June 14, 2000, Cohen filed a Motion to Stay Issuance of the Mandate based on the

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[9] The Eleventh Circuit granted permission and on March 23, 2000 a Brief of *Amicus Curiae* Gold Kist, Inc., GTE South, Inc., GTE Wireless, Inc., Mohawk Industries, Inc., National Association of Independent Insurers and Safeco Insurance Company of America was filed with the Eleventh Circuit in support of Cohen's Petition for Rehearing. The Amicus Brief raised arguments that a claim for punitive damages represents a common and undivided interest and that in interpreting the "matter in controversy" language of Section 1332 by disregarding a defendant's interests in a case, the Cohen II panel's decision violated Constitutional equal protection guarantees.

conflicting opinions between the Fifth and Eleventh Circuit Courts of Appeals regarding the matter of aggregation of punitive damages in deciding the amount in controversy under 28 U.S.C. Section 1332. Cohen argued that not only did the Cohen II's decision to follow Lindsey result in a reversal of the law of the circuit since 1996, established by Tapscott, but it is in conflict with the Fifth Circuit Court of Appeals decision in Allen, which held that aggregation of punitive damages is permitted, to satisfy jurisdictional amounts, where plaintiffs unite to enforce a single title or right in which they have a common and undivided interest. Cohen maintained that this conflict was a proper bases for this Court to consider granting certiorari in this case.

Cohen also pointed out in her Motion to Stay Issuance of the Mandate that an additional basis for the granting of a petition for writ of certiorari is that Lindsey relied on Zahn in determining that the claims of several plaintiffs cannot be aggregated for purposes of satisfying jurisdictional requirements and that each member of a class was required to satisfy the amount in controversy requirement. This holding is in conflict with the Fifth Circuit Court of Appeals decision in Free v. Abbott Laboratories, Inc., 51 F. 3d 524 (5th Cir. 1995), aff'd, 120 S. Ct. 1578 (U.S. April 3, 2000), in which the Court held that 28 U.S.C. Section 1367, which provides for supplemental jurisdiction of federal courts, overruled the holding in Zahn which required that each member of a class action satisfy the amount in controversy requirement of 28 U.S.C. 1332. The Free Court noted that if a class representative satisfies the amount in controversy a district court can exercise supplemental jurisdiction over members of a class although they do not meet the amount-in-controversy

requirement. Free, 51 F.3d at 529. Cohen maintained that this Court's per curiam affirmance of the Free decision left an important question of federal law unresolved.

On July 7, 2000 the Eleventh Circuit Court of Appeals granted Cohen's request to stay issuance of the mandate through August 15, 2000, pending the filing of the instant Petition for Writ of Certiorari. (App. D, *infra*, 49a-50a).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

A. The Conflict Between the Circuit Courts of Appeals On the Issue of Aggregation of Punitive Damages Compels the Granting of the Petition Sought Herein

As one court recently acknowledged, "The problem [in determining to allow aggregation of punitive damages] is confusion among the circuits, within the circuits, and, consequently, across the board with all districts." See ABS Insurance Ltd. v. Nat'l Union Fire Insurance Co., 51 F. Supp. 2d 762 (E.D. Tex. 1999).

Prior to setting forth a discussion regarding the conflict in the Circuit Court decisions, it is important to note that this Court has not resolved the issue whether punitive damages may be aggregated to satisfy the amount in controversy requirement of Section 1332, but this Court has established long-standing law on the issue of when plaintiffs may claim a common and undivided interest in a matter to establish the amount in controversy under Section 1332.

1. This Court's Pronouncement Regarding Common and Undivided Interests

The starting point for analyzing the issue of aggregation of damages is this Court's determination regarding when claims may be considered to be common and undivided. As early as 1967, the former Fifth Circuit acknowledged the vitality of the Supreme Court's holdings regarding the aggregation of common and undivided interests by plaintiffs, as an exception to satisfying individual jurisdictional amount in controversy requirements under 28 U.S.C. Section 1332. In Alvarez v. Pan American Life Ins. Co., 375 F.2d 992, 993 (5th Cir. 1967) the Court noted the distinction between separate and distinct claims, which are not aggregable, and instances where several plaintiffs unite to "[e]nforce a right or title which they hold in common," which may be aggregated for jurisdictional purposes.

In this Court's seminal case on the issue of aggregation of damages, Snyder v. Harris, 394 U.S. 332, 89 S. Ct. 1053 (1969),[10] this Court addressed the question of whether the

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[10] The "exception" to the rule of non-aggregation dates at least to 1891 when this Court described the exception as follows:

> The general principle observed in all [cited cases] is that if several persons be joined in a suit in equity or admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction ...

claims of the plaintiffs in a class could, merely by virtue of the plaintiffs' class status, be aggregated to satisfy the amount in controversy requirement. The Supreme Court held that they could not in the matter before it, but reiterated its long-standing and well-settled law that aggregation was permissible in cases where "[t]wo or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest." Id. at 335.

Similarly, in Zahn v. International Paper Co., 414 U.S. 291, 94 S. Ct. 505 (1973) the Court reiterated the principle that "[w]hen several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount." Id. at 294.

2. Lindsey Failed to Consider this Court's Holdings in Snyder and Zahn

Within this existing legal framework, in Lindsey, the plaintiffs brought a class action under Alabama law against two telephone companies. While the plaintiffs each claimed $2,000 in compensatory damages, the class sought $1,000,000 in punitive damages. The Lindsey Court noted that "[s]ignificantly, the complaint nowhere alleges the number of persons in the class, an allegation that would have permitted the court to ascertain what dollar amount represents the 'amount in controversy' for each member of the class." Id. at 595. On this

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Clay v. Field, 138 U.S. 464, 11 S. Ct. 419 (1891) (citations omitted).

basis and without analysis, the Lindsey Court remarked that the "claims of several plaintiffs, suing as members of a class, cannot be aggregated." Lindsey, 576 F.2d at 594, citing, Snyder, 394 U.S. 332; Zahn, 414 U.S. 291.

Notably, the Lindsey Court did not address the holdings or analysis of Alvarez, Snyder or Zahn that aggregation is permissible to meet the amount in controversy requirement where "two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest." Snyder, 394 U.S. at 335. In fact, although the plaintiff class in Lindsey did request exemplary damages for their common law tort claims under Alabama law, the Fifth Circuit was not presented with the issue of whether the punitive damages sought were a common and undivided interest of the class for the purpose of aggregation.

3. In Allen and Tapscott the Fifth and Eleventh Circuits Analyzed the Issue of Aggregation of Punitive Damages Based on this Court's Decisions in Snyder and Zahn

Subsequently, and of consequence in this petition, the Fifth Circuit decided Allen v. R&H Oil & Gas Co., 63 F.3d 1326 (5th Cir. 1995). In Allen, 512 plaintiffs brought tort claims in a Mississippi state court for damages resulting from an explosion and release of toxic fumes and sought both compensatory and punitive damages, but did not allege a specific amount. After removal by the corporate defendants and in determining diversity jurisdiction, the Fifth Circuit noted that where "[t]wo or more plaintiffs unite to enforce a single

title or right in which they have a common and undivided interest," then, aggregation was allowed. 63 F.3d at 1300. The Allen court also acknowledged that no clear standards existed to determine when to apply this standard, but that "recognized guidelines ... that have evolved" suggest that when plaintiffs' rights are "integrated" and arise from the same legal source, then they could be considered common and undivided. Id. at 1330.

The Allen Court held that Mississippi state law required a district court to aggregate a group of plaintiff's Mississippi punitive damage claims when making the jurisdictional determination. The Court analyzed punitive damages under the state law before it and determined that they were "fundamentally collective," not compensatory and were intended to punish a tortfeasor and to deter him from similar conduct. Id. at 1335. The Court held

> As punitive damages are collective awards, each plaintiff has an integrated right to the full amount of an award. An award's ultimate distribution does not change this result. Punitive damages are, to use the language of the caselaw, undivided claims of right with a potentially separable award. Here, each of the 512 plaintiffs was empowered to bring a claim for punitive damages separately. The fact that they choose not to pursue their claims individually does not limit each plaintiff's alleged entitlement to the award; it only affects its distribution. The limiting factor

> here was the plaintiffs' decision to file jointly.

Id. at 1333.

Allen is a Fifth Circuit opinion decided subsequent to Lindsey, and although the Allen Court was bound by any Fifth Circuit opinions regarding aggregation, including Lindsey, the Court cited to Lindsey and noted that "[the issue whether joint claims for punitive damages under Mississippi law represent a common and undivided interest] is a [question] of first impression on the appellate level in this circuit." Allen, 63 F.3d at 1332.[11]

One year later, the Eleventh Circuit decided Tapscott, 77 F.3d 1353 (11th Cir. 1996). In Tapscott, the Eleventh Circuit held that in determining the total amount in controversy for the purpose of federal jurisdiction, a class action claim for

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[11] Another Fifth Circuit decision decided after Allen, Ard v. Transcontinental Gas Pipe Line Corp., 138 F.3d 596 (5th Cir. 1998) held that punitive damages were not aggregable. However, a clear reading of the Ard opinion reveals that the Court discussed the various opinions regarding aggregation of punitive damages, including Tapscott and Allen, and determined that in Tapscott and Allen, the nature of punitive damages under state law resulted in a finding that aggregation of punitive damages would be allowed. The Ard Court did not disagree with Allen or Tapscott, but, instead, analyzed the aggregation issue by looking at Louisiana law and found aggregation was not appropriate. 138 F.3d at 601. Therefore, although the Ard Court reached a different result, the Ard opinion is consistent with Allen.

punitive damages should be considered in the aggregate, without proration to each class member. Id.

As in Allen, the Tapscott corporate defendant removed a state court class action, which involved violations of Alabama law arising from the sale of service contracts on automobiles. In opposing the removal, plaintiffs sought to limit their individual damages and those of any other class members to an amount not more than $49,000, which included statutory, compensatory and punitive damages, and injunctive relief. 77 F.3d at 1355.

In making a determination regarding whether the amount in controversy was satisfied, the Tapscott Court noted that if the punitive damages in the putative class action could be considered in the aggregate, then the $50,000 requirement was satisfied. Id. at 1357. The court decided that whether punitive damages are aggregable "cannot be determined on the distinction of whether they arise from multiple individual transactions or from a single act or mass tort." Id. at 1358, n.11. Instead, the Tapscott Court held, as did Allen, that the inquiry must focus on the nature of punitive damages under the state law at issue, i.e., Alabama. Id. The Court determined that the purpose of punitive damages in Alabama "is to deter wrongful conduct and punish those responsible ... An injured party is not entitled to punitive damages as a matter of right ... Rather, the state and not the victim is considered the true party plaintiff because punitive damages do not compensate a victim for loss but serve to punish and deter." Id. (citations omitted).

Notably, the Tapscott Court also cited to Lindsey, but proceeded to analyze the issue before it as one unsettled in the

Eleventh Circuit. 77 F.3d at 1357. In fact, both the Tapscott and Allen Courts, which cited to Lindsey, and which would have been bound by Lindsey, properly concluded that the issues presented to them for resolution were questions of first impression in the Fifth and Eleventh Circuits.

Clearly, as the discussion set forth above shows, Lindsey did not consider or address whether punitive damages are common and undivided interests, the very issues presented in Allen and Tapscott. Therefore, it was proper for the Allen and Tapscott Courts to recognize Lindsey for a general rule regarding non-aggregation under Snyder, and then to proceed to analyze and resolve the issue of whether punitive damages are properly aggregated as a common and undivided interest under the state law at issue.

4. The Eleventh Circuit's Judgment in Cohen II Created a Conflict with the Allen Opinion on an Important Issue of Federal Law That is Unresolved and Must Be Settled by This Court

The Eleventh Circuit in Cohen II asserted that Lindsey's holding regarding non-aggregation of punitive damages should stand as the law of the Circuit.[12] Such a determination created

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[12] Notably, the Cohen II Court held that punitive damages under Florida law were indistinguishable from those under Alabama law as they were designed to serve the collective good, and are warranted only "[w]here the egregious wrongdoing of the defendant ... constitutes a public wrong." (App. B., *infra*, 26a).

a conflict with the Fifth Circuit's pronouncement in Allen and is flawed, since Lindsey clearly failed to apply the then existing Supreme Court law regarding common and undivided interests, under Snyder and Zahn. Certainly, Lindsey's citation to Snyder and Zahn as to the general proposition of non-aggregation, did not address or determine the state of the law at the time of the decision, something the Cohen II panel clearly overlooked in determining that Lindsey was the law of the circuit.

Had Lindsey expressly and specifically considered the well-settled exception regarding aggregation found in Snyder and Zahn, then the Cohen II panel's interpretation and application of Lindsey and Tapscott would make sense.

Rather, the Cohen II decision resulted in the undeniable and inequitable fact that class action litigants who present claims in the Fifth Circuit based on diversity jurisdiction will be entitled to a review of the aggregability of punitive damages sought under the state law at issue -- under Allen -- while class action litigants who present claims in the Eleventh Circuit will never be entitled to such review by the district courts.

In addition, numerous cases are before the federal courts in the Eleventh Circuit, at all stages of the proceedings, based upon the Tapscott decision, which cases will be prejudiced greatly by the loss of subject matter jurisdiction by the federal courts.

To effectuate a resolution of such a conflict and to resolve an important question of federal law that is unsettled are the very reasons this Court grants certiorari review. As this

Court stated in Braxton v. United States, 500 U.S. 344, 111 S. Ct. 1854 (1990)

> A principle purpose for which we use our certiorari jurisdiction, and the reason we granted certiorari in the present case, is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law ...

Id., 500 U.S. at 347, 111 S.Ct. 1857. See, FTC v. Flotill Products, Inc., 389 U.S. 179, 88 S. Ct. 401 (1967) (Court held that conflicts with decisions of other courts of appeals compelled the granting of certiorari for a review of such decisions); Jarecki v. G.D. Searle & Co., 367 U.S. 303, 81 S. Ct. 1579 (1961) (Court granted certiorari to resolve the conflict between the decisions of the First and Seventh Circuits). See also, First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 88 S. Ct. 1575 (1968) (Certiorari granted to determine whether decisions of federal courts were in conformity with prior Supreme Court decision relating to availability of summary judgment in antitrust litigation).

There can be no clearer example of the need for this Court to grant certiorari to review and determine an important issue of law over which the Courts of Appeals are in conflict and which is unsettled.

Further, it is clear that based on the Snyder and Zahn decisions and the law regarding common and undivided interests, which this Court has not specifically resolved as to

punitive damages, the Allen and Tapscott Courts' determination to look to state law as the basis for concluding whether to aggregate punitive damages to satisfy the amount in controversy requirement of 28 U.S.C. Section 1332 is sound and correct.

Importantly, it is undeniable that in the context of a class action, punitive damages are awarded as a single, undifferentiated sum based on common conduct that affects an entire class, rather than discrete and differentiated conduct that varies based on each member's particular circumstances. In fact, this Court has recognized that "under the law of most states, punitive damages are imposed for purposes of retribution and deterrence." Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19, 111 S. Ct. (1991). Thus, it is "a well-established principle of the common law that in [tort] actions ... a jury may inflict ... exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff." 499 U.S. at 16, 111 S. Ct. at 1042.

These general principles are precisely the bases for the Allen and Tapscott decisions and make it clear that a claim for punitive damages, particularly from a class action perspective, represents a claim for a common and undivided interest in a single sum.

In addition, Fed.R.Civ.P. 23 imposes proof requirements to ensure that the claims and defenses of the class are common to a group of similarly situated people. Likewise, a class claim for punitive damages is dependent on common proof of a defendant(s) actions. Thus, considerations under

Rule 23 also result in a determination that Cohen II is wrongly decided as the law on the issue of aggregation of punitive damages under Section 1332.

5. An Additional Bases for Granting Certiorari is the Uncertainty Regarding the Viability of this Court's Holding in Zahn

Moreover, an additional basis for granting the petition for writ of certiorari in this matter is that Lindsey v. Alabama Telephone Company, 576 F.2d 593 (5th Circuit 1978) cited to Zahn in determining that the claims of several plaintiffs cannot be aggregated for purposes of satisfying jurisdictional requirements and that each member of a class was required to satisfy the amount in controversy requirement.

This holding in Lindsey, and affirmance by Cohen II is in conflict with the Fifth Circuit Court of Appeals decision in Free v. Abbott Laboratories, Inc., 51 F. 3d 524 (5th Cir. 1995), aff'd, 120 S. Ct. 1578 (U.S. April 3, 2000), in which the Court held that 28 U.S.C. Section 1367, which provides for supplemental jurisdiction by federal courts, overruled the holding in Zahn. Specifically, the Free Court determined that Zahn was overruled with respect to the requirement that each member of a class action satisfy the amount in controversy requirement of 28 U.S.C. 1332.

The Free Court noted that if a class representative satisfies the amount in controversy, a district court can exercise supplemental jurisdiction over members of a class although they did not meet the amount-in-controversy requirement.

In Free, this Court granted certiorari on the specific question whether the supplemental jurisdiction statute overruled Zahn and expands federal jurisdiction in a class action to encompass class members whose claims do not satisfy the amount in controversy requirement of Section 1332. The grant of certiorari and this Court's per curiam affirmance of the Free Court's holding clearly affects the viability of the Lindsey opinion, to the extent that Lindsey cited to Zahn on the issue of non-aggregation. Thus, further conflict, uncertainty and confusion exists regarding the Circuit Courts' determination of federal diversity jurisdiction.

B. An Interpretation of the "Matter in Controversy" Language of Section 1332 that Disregards a Defendant's Interest in the Case Violates Equal Protection Guarantees

An additional important federal question determined by Cohen II and Lindsey, which this Court has not settled, is that the "matter in controversy" language in Section 1332 should be interpreted exclusively from a single plaintiff's perspective. Such a determination is fundamentally inconsistent with the purpose of the statute, especially in the context of modern class action litigation. Also, such an interpretation deprives a foreign defendant of the statutorily created right of access to a federal court when faced with very large monetary judgments. Thus, not only is the statute, as interpreted and applied in this manner, not rationally related to a legislative aim, but undermines the very purpose of Section 1332.

As an initial matter, when Congress enacted Section 1332(a) it did not expressly define the phrase "matter in

controversy." This Court has held that "the amount in controversy is measured by the value of the object of the litigation." Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 346, 97 S. Ct. 2434 (1997). Notably, this Court never has ruled that the value must be determined exclusively from a plaintiff's perspective. Nevertheless, the Lindsey and Cohen II opinions have determined that the phrase "matter in controversy" must be interpreted exclusively from the perspective of a single plaintiff.

Congress enacted Section 1332 "to provide a separate forum for out-of-State citizens against the prejudices of local courts and local juries by making available to them the benefits and safeguards of the federal courts." Jerguson v. Blue Dot Invest., Inc., 659 F.2d 31, 35 (5th Cir. 1981).[13] Despite such Congressional intent, a "single plaintiff's perspective" interpretation of the statute results in manipulative and gerrymandered pleadings designed to strip defendants of the federal court access the statute was designed to provide. See, e.g., Saunders v. Wire Rope Corp., 777 F. Supp. 1281, 1284 (E.D. Va. 1991). Such an interpretation also is irrational because it undermines Congress' objective of providing out-of-

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[13] The protections of Section 1332 apply with even greater force in class action litigation. As the Third Circuit noted, "[f]rom a policy standpoint, it can be argued that national (interstate) class actions are the paradigm for federal diversity jurisdiction because, in a constitutional sense, they implicate commerce, foreclose discrimination by a local state, and tend to guard against any bias against interstate enterprises. Kress v. Prudential Ins. Co. (In re Prudential Ins. Co. of America Sales Practices Litigation), 148 F.3d 283, 305 (3d Cir. 1998).

state citizens with access to the federal courts when the matter in controversy exceeds $75,000.

As a general rule, laws must treat similarly situated persons equally unless the statute at issue is rationally related to a legitimate state interest. Reed v. Reed, 404 U.S. 71, 75, 92 S. Ct. 251 (1971). Indeed, although the federal courts are courts of limited jurisdiction, once Congress provides access, "lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." Harper v. Virginia State Bd. Of Elec., 383 U.S. 663, 665, 86 S. Ct. 1079 (1966).

To the extent that Lindsey, Cohen II and other such decisions interpret Section 1332 exclusively from a single plaintiff's perspective, they treat similarly situated citizens unequally, and in a way that is contrary to the state interest embodied in Section 1332.

Based on this Court's equal protection precedents, a court "must consider the facts and circumstances behind the law, the interests which the [legislature] claims to be protecting, and the interests of those who are disadvantaged by the classification." Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 725, 93 S. Ct. 1224 (1973) (citation omitted). Even under the lower standard imposed by the rational relationship test, Section 1332 cannot be constitutionally construed from a single plaintiff's perspective only.

Accordingly, in light of the stated purpose of the diversity jurisdiction statute and the amount in controversy

requirement, any application of Section 1332, that discriminates against out of state defendants by preventing access to a federal forum violates the equal protection guarantees of the Constitution.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully Submitted,

ALVIN D. LODISH
Counsel of Record
BILZIN SUMBERG DUNN
PRICE & AXELROD
Counsel for Petitioner, Cheryl Cohen
200 South Biscayne Blvd., Ste. 2500
Miami, Florida 33131-2336
(305) 374-7580
-and -
ROBERT C. MALAND
ROBERT C. MALAND, P.A.
Two Datran Center, Suite 1705
9130 S. Dadeland Blvd.
Miami, Florida 33156
(305) 670-4900